Supreme Court of the United States

October Term, 19[illegible]

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

AGAINST

JERRY J. CALABRITTO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent asserts that the petition presents no adequate or sufficient reason for the granting of a Writ of Certiorari.

The Case History

Respondent, a yard brakeman, employed by the railroad company (petitioner) was injured on July 20, 1955. A complaint under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60) and the Federal Boiler Inspection Act (45 U. S. C. A. §§17-34) was filed on January 27, 1956, in the United States District Court for the Eastern District of New York. A note of issue was filed February 23,

1956, and the case was finally reached for trial before Judge Bruchhausen and a jury on February 23, 1960.

Trial was continued on February 24, 25, 26 and 29. The case was submitted to the jury by Judge Bruchhausen on both of the aforementioned Statutes. The jury returned a general verdict for the plaintiff for $25,000. Counsel made no motion to set aside the verdict as contrary to the evidence or against the weight of the evidence or that it was excessive.

An appeal was taken to the United States Court of Appeals for the Second Circuit and was argued on December 7, 1960. The Court filed its decision on February 21, 1961. The main opinion was written by Judge Clark with concurring opinions by Judges Waterman and Friendly. Almost six years have elapsed since the respondent was injured.

Statement of Facts

Respondent, a brakeman, reported for work at 11:55 p.m., daylight saving time, on July 19, 1955, at the yardmaster's office at the Cedar Hill Yard of the petitioner at New Haven (12, 13).* Yardmaster Arthur Wasserman (33, 66) assigned him as head brakeman on a switching crew to classify cars in the West Hump in said yard (12, 53, 61).

After making a couple of small moves the switching crew coupled to a drag of cars on Track 9 and pushed them westward over the hump (13, 14). Conductor Albert D. Smith directed plaintiff to throw certain switches and then ride the engine to the top of the hump where the

* Unless otherwise specified, page references are to Appellant's Appendix

conductor was stationed (14, 32). In accordance with the conductor's orders respondent threw these switches and then got on the engine on the south side at the east or rear end thereof (14, 15). He passed through the cabin, and went out the door on the fireman's side to the catwalk or runway which extended along the south or fireman's side of the engine (14). He proceeded westward and, when he reached the front or west end of the engine, he turned to his right to cross to the north side on the platform of the engine (15, 16).

He noticed sand on the platform but nothing else (16, 19). As he took a step along the front platform "both feet went from under me all at once", and he fell to the platform landing on his back with his head toward the north (16, 32, 33, 58, 66). He was rendered unconscious and continued unconscious for some time (16, 33, 69).

When the engine approached conductor Smith, who was standing at the top of the hump (32), he saw respondent lying on his back on the front platform with his head to the north (33). He immediately hollered over the loudspeaker "A man was hurt" (33). He, fireman Fratto, engineer Doolittle and yardmaster Wasserman put respondent on a stretcher, which yardmaster Wasserman had brought, and carried him to the rear deck of the engine and the engine carried respondent, still unconscious, to Rock Street, Cedar Hill (33, 34, 66, 67, 68) where he was transferred to an ambulance which took him to the New Haven Hospital.

Conductor Smith testified that when he assisted in removing respondent from the platform, he found that there was sand and oil on the said platform (34). The engine was taken out of service at Cedar Hill and another engine furnished to complete the work (34, 68).

Fireman Fratto reported for work at 11:55 p.m., daylight saving time, on July 19, 1955 (53, 60). Before he started to work he checked the engine over, as was his duty, and found sand on the front platform but did nothing about it although it was his duty "to see if there is anything wrong with it" (54, 64). When he assisted in removing respondent from the platform, Fratto saw sand on said platform but did not remember seeing any oil or grease nor did he look for any (64).

The accident to respondent occurred at 12:30 a.m. standard time, or 1:30 a.m. daylight saving time, on July 20, 1955 (36). This was at least one and one-half hours after fireman Fratto had checked the engine and found sand on the front platform.

Petitioner excused its failure to call engineer Doolittle because Doolittle had had surgery and could not come to court. Petitioner, however, gave no excuse for its failure to call yardmaster Arthur Wasserman who was in charge of the yard, brought the stretcher to the engine and knew that respondent was still unconscious when sent to the hospital. Undoubtedly it was he who took the engine out of service and ordered a replacement.

Answering the Questions Presented by Petitioner

The questions presented on this petition for a Writ of Certiorari are stated on page 3 as follows:

"1. May a jury find a railroad employer negligent towards its employee because of a *transient* condition on one of its locomotives of which it had no actual or constructive notice?" (Italics ours.)

"2. May a jury find a violation of the Federal Boiler Inspection Act with respect to a *transient* condi-

> tion on a locomotive that did not arise as a result of any mechanical or structural defect?" (Italics ours.)

As we read the dictionaries, the synonyms for the word "transient" are temporary, fleeting, passing quickly. That the oil on the platform was not "transient" is clear from the evidence. At 11:55 p.m. on July 19, 1955, fireman Fratto before he started to work checked the engine over and found sand on the front platform but did nothing about it although it was his duty "to see if there was anything wrong with it" (54, 64).

Sand is not placed on a locomotive platform unless there is need therefor.

The accident occurred at 1:30 a.m. daylight time on July 20, 1955, at which time conductor Smith testified he saw sand and oil on the platform. This was at least one and a half hours later than Fratto's inspection. And then the engine was taken out of service, undoubtedly because it was not safe to operate.

It is most imaginative to call the condition shown by the evidence, a "transient" condition.

Answering Petitioner's Reasons for Granting the Writ

These reasons are stated on page 5 of the petition and read as follows:

> "This case presents important questions of federal law which have never been decided by this Court, and conflicting decisions among state and federal courts."

We assert there is no question presented in the case that has not been decided by this Court.

(a)

Answering subdivision (a) (petition, p. 5), we refer to respondent's "Statement of Facts" and argument under "Answering the Questions Presented by Petitioner" on the issue of negligence under the Federal Employers' Liability Act. In this argument of petitioner again the words "transient" condition are used.

As to the question of notice to the railroad of any dangerous condition, Judge Bruchhausen charged the jury as follows (77):

> "You may not find the railroad responsible unless you find that the sand and oil as claimed by the plaintiff was on the platform for such a length of time that the defendant knew or should have known of its presence."

As to speculative evidence, for which petitioner cites *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951), Judge Bruchhausen charged as follows (81):

> "Your deliberations should be on the evidence, not upon any speculative or conjectural means."

These instructions were clear and specific and it must be concluded that the jury's verdict followed such instructions.

In his opinion (Petition—App. 3) Judge Clark, referring to liability under the Federal Employers' Liability Act, states as follows:

> "On this record the jury could find that the railroad, through its employees, knew or should have known that a dangerous slippery condition existed in the area where plaintiff would pass in the course of his duties. Unless there is a complete absence of probative facts to support the conclusion reached, the jury verdict must stand."

Judges Waterman and Friendly fully agreed with this conclusion of Judge Clark.

(b)

Petitioner claims that the case presents a question of law not *finally* determined by this Court, whether a *"transient"* condition not resulting from mechanical or structural defect of an engine on which it is present constitutes a violation of the Federal Boiler Inspection Act (Italics ours).

Petitioner then contends that the answer to this question depends on whether the *dictum* in this Court's opinion in *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481-489 (1943), is to be considered as a broad general doctrine.

The language in the *Lilly* case is not a *dictum*. At page 485 of the opinion this Court said:

> "Negligence is not the basis for liability under the Act. Instead it 'imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary peril to life or limb' (citing cases). Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal

> **Employers' Liability Act, charging the violation of the Boiler Inspection Act (citing cases). The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment (citing cases).''**

At page 486 this Court said:

> "The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated."

And again on page 487 this Court said:

> "From various cases denying recovery under the Act, respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous object or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate * * * without unecessary peril to life or limb'."

In his opinion in this case, Judge Clark states definitely that in the *Lilly* case this Court expressly rejected a narrow reading of §23 of the Boiler Inspection Act and quotes from the *Lilly* case as set forth above.

Both the concurring judges believe the law applicable to the case is decided by the *Lilly* case and agree completely with Judge Clark's opinion.

We cite a few of the cases supporting the *Lilly* decision:

Urie v. *Thompson*, 337 U. S. 191 (1949);
Baltimore & Ohio R. Co. v. *Jackson*, 353 U. S. 325, 329 (1957);
Kernan v. *American Dredging Co.*, 355 U. S. 424, 426, 444 (1958);
Bolan v. *Lehigh Valley R. Co.*, 167 F. 2d 934, C. C. A. 2 (1948);
Louisville & N. R. Co. v. *Botts*, 173 F. 2d 164, C. C. A. 8 (1949).

In his opinion Judge Clark also distinguishes various cases cited by petitioner, namely:

Ford v. *N. Y. N. H. & H. RR. Co.*, 54 F. 2d 342, cer. den. 285 U. S. 549 (C. C. A. 2d 1931);
Raudenbush v. *B. & O. R. Co.*, 160 F. 2d 363 (1946);
Camp v. *Atlantic Coast Line R. Co.*, 36 So. 2d 331 (1948);
Reeves v. *Chicago, St. P. M. & O. Ry. Co.*, 147 Minn. 114, 179 N. W. 689;
Riley v. *Wabash Ry. Co.*, 44 S. W. 2d 136 (Mo. 1931).

Respondent respectfully submits that there is no question presented in the case that has not been decided by this Court in the *Lilly* case.

The case comes within both the Federal Employers' Liability Act and the Federal Boiler Inspection Act. The

jury was clearly and specifically instructed by Judge Bruchhausen as to both these Acts, as well as to speculative evidence and actual or constructive notice.

The Court of Appeals was unanimous in its decision for respondent.

Respondent respectfully submits, therefore, that the verdict of the jury and the opinion of the United States Court of Appeals are justified under both Acts.

The Writ Should Be Denied.

Respectfully submitted,

WILLIAM PAUL ALLEN,
Attorney for Respondent.